CASE NO. 81-40

IN THE SUPREME COURT OF THE UNITED STATES
(October Term 1981)

Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

CYNTHIA PROCTOR,

Petitioner,

vs.

PAUL KRAMER, M.D.,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

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BRIEF OF RESPONDENT

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BRIEF IN OPPOSITION TO ACCEPTANCE OF JURISDICTION

A. QUESTION PRESENTED FOR REVIEW

Pursuant to Rule 34.2, United States Supreme Court Rules, respondent respectfully submits that the Question Presented for Review set forth in the Petition for Certiorari is, in certain particulars, neither accurate nor satisfactory and requires response by respondent in order to correctly characterize the issue before this Court in these proceedings. Respondent does not take issue with the procedural chronology set forth by petitioner.

When the trial court having jurisdiction over the matter, the Circuit Court of the Seventeenth Judicial Circuit of Florida, in and for Broward County, rendered summary final judgment in favor of respondent and against petitioner, petitioner appealed to the District Court of Appeal of Florida, Fourth District, in accordance with the provisions of Article V, Section 4(b)(1), Florida Constitution, which provides in pertinent part as follows:

> "District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of the trial courts. . . ."

In accordance with practice and procedure set forth in the Florida Appellate Rules, a party appealing a final judgment presents a written brief to the court, as does the appellee, has the opportunity to file a reply brief, and presents oral argument. The District Court of Appeal reviews the original record forwarded to it and renders its decision.

In this particular instance, the decision of the District Court of Appeal of Florida, Fourth District, was a per curiam affirmance without opinion. One judge dissented, stating that in his opinion, the Court should follow the reasoning of the decision of a sister District Court of Appeal which would result in reversal of the summary final judgment against petitioner.

The decision of the District Court of Appeal was issued on May 7, 1980. On June 26, 1980, while a petition for rehearing was pending (it was not denied until March 3, 1981), the

Supreme Court of Florida issued its opinion in Jenkins v. State, 385 So.2d 1356 (Fla. 1980). The Jenkins decision was one in a series of clarifying opinions necessitated by a recent amendment to Article V, Section 3(b)(3) of the Florida Constitution setting forth the discretionary jurisdiction of that court.

Prior to the effective date of the amendment, April 1, 1980, the applicable provision of the Florida Constitution gave to the Supreme Court of Florida discretionary jurisdiction to review any decision of a district court of appeal that was in direct conflict with the decision of any district court of appeal or the Supreme Court. Subsequent to amendment, the section provides that the Supreme Court of Florida may review any decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal or the Supreme Court.

The Jenkins decision addresses the question of whether the Supreme Court of Florida, under the amended constitutional provision, has jurisdiction to review a decision of a district court

of appeal which reads in its entirety "Per Curiam Affirmed" where a dissenting opinion is filed in the case. The Court answers that question in the negative.

Thus, petitioner's statement that while her case was "in the appellate process" she could have expected Supreme Court review in the event the Fourth District Court of Appeal ruled contrary to the Third District Court of Appeal is not accurate. The Jenkins decision, issued before the decision of the District Court of Appeal became final established the law of Florida henceforward to be that a "Per Curiam Affirmance" with dissent was not reviewable under the discretionary review provisions of the newly amended Constitution.

Petitioner incorrectly states that after her motion for rehearing was denied in the District Court of Appeal she filed "an appeal" to the Florida Supreme Court. No appeal as a matter of right would lie from the decision of the District Court of Appeal in the instant

case.[1] Petitioner's appeal as a matter of right was from the trial court to the District Court of Appeal. Thereafter, in order to seek review petitioner had to, and did, seek to have the Supreme Court of Florida exercise its discretionary jurisdiction to review the decision of the District Court of Appeal. Petitioner's repeated reference to the proceedings filed in the Supreme Court of Florida as an "appeal" are incorrect and misleading.

Petitioner characterizes the refusal by the Supreme Court of Florida to exercise its discretionary jurisdiction to review a "Per Curiam Affirmance" without opinion as arbitrary and capricious and a denial of due process and equal protection of the law. The real Question Presented for Review is whether the Supreme Court of Florida, following the pattern set by the Supreme Court of the United States, may properly refuse to exercise its discretionary jurisdiction to review the decision of a lower appellate

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[1]Article V, Section 3(b)(1) and 3(b)(2), Florida Constitution.

court, particularly where the State constitution, as interpreted by the Supreme Court of the state, does not provide for such discretionary review.

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D. JURISDICTIONAL GROUNDS

Respondent submits that the judgment sought to be reviewed is not, as stated by petitioner, dismissal by the Florida Supreme Court of petitioner's appeal by order dated April 8, 1981. The order of the Supreme Court is a dismissal of the proceedings filed by petitioner by notice to invoke the discretionary (certiorari) jurisdiction of the court based on an asserted conflict of decisions between district courts of appeal on the question of termination of jurisdiction of medical mediation panels.

Jurisdiction of this Court is challenged on the basis that the decision here sought to be reviewed is not a "final judgment" rendered by the highest court of a state in which a decision could be had where a right is claimed under the United States Constitution pursuant to 28 U.S.C. § 1257(3). The order of the Supreme Court of Florida refusing to exercise its discretionary jurisdiction is not a final judgment cognizable under the laws of the United States for review in this Court.

E. CONSTITUTIONAL PROVISIONS

Constitution of the State of Florida, Article V

"§ 3 Supreme court

* * *

(b) Jurisdiction.--The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telepone service."

F. STATEMENT OF THE CASE

Petitioner's Statement of the Case is correct except in stating that petitioner "appealed to the Florida Supreme Court". As previously pointed out, petitioner's appeal was to the District Court of Appeal of Florida, Fourth District. This appeal resulted in the "Per Curiam Affirmance" without majority opinion. This determination of the District Court of Appeal was sought to be reviewed in the Supreme Court of Florida by way of invoking the discretionary jurisdiction of that court. The petition for review was dismissed by the order which is the subject of the instant proceedings.

G. SUMMARY OF ARGUMENT

The Constitution of the State of Florida guarantees to petitioner the right to appeal from an adverse determination rendered by a trial court. Petitioner exercised her constitutional right by appealing to the designated district court of appeal. That court decided against petitioner on the merits of her claim, but chose not to write an opinion explaining its reason. There was a dissent.

Petitioner thereafter sought to have the Supreme Court of Florida exercise its discretionary jurisdiction to review the decision of the district court of appeal. The Supreme Court of Florida, having previously determined that it did not have jurisdiction to review a decision of a district court of appeal which reads in its entirety "Per Curiam Affirmed" where a dissenting opinion is filed, dismissed the application for review filed by petitioner. In doing so, it neither denied to petitioner due process nor equal protection of the law.

This Court has refused to review orders of the highest court of a state which merely de-

cline to exercise discretionary review where the order does not reflect a determination on the merits. Furthermore, an order declining to accept discretionary jurisdiction is not a final judgment rendered by the highest court of a state in which a decision could be had subject to review by this Court because a right is claimed under the Constitution of the United States.

H. ARGUMENT

Petitioner seeks to have this Court exercise its discretion to review an order of the Supreme Court of Florida declining to exercise its discretion and dismissing the application for review previously filed in that court. Petitioner claims such dismissal is a denial of her right to due process and equal protection guaranteed by the United States Constitution. Petitioner's claim is without merit.

It is and has been the basic policy of this Court that its only power over a state judgment is to correct it to the extent that it incorrectly adjudges federal rights. Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 828, 89 L.Ed. 79 (1945). This supervisory authority over state court decisions has been succinctly described:

> "We do not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement." Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 2013, 32 L.Ed.2d 530 (1972).

Here, the Supreme Court of Florida exer-

cised its constitutional prerogative to determine the extent of its discretionary jurisdiction under the appropriate provision of the Florida Constitution. That document, recently amended by the electorate of the State of Florida, provides that the Supreme Court may review a decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal or the Supreme Court on the same question of law.

Shortly after the 1980 amendment to the Constitution, the Supreme Court issued an explanatory decision in Jenkins v. State, 385 So.2d 1356 (Fla. 1980). It addressed the question of whether that court had jurisdiction to review a decision of a district court of appeal which reads in its entirety "Per Curiam Affirmed" where a dissenting opinion is filed in the case. In Jenkins, discretionary review was sought under the new constitutional provision, asserting that such a decision of the district court of appeal was in conflict with the decisions of other districts or of the Supreme Court on a question involving uncorroborated hearsay infor-

mation from a confidential informant.

In answering the question as to its jurisdiction, the Supreme Court carefully analyzes the dramatic change made to the Florida Constitution by the latest amendment to that section which sets forth the area of discretionary review by the Supreme Court of Florida. Prior to the April 1, 1980 amendment, the provisions of the applicable section of the Florida Constitution relating to review of conflicting decisions read that the Supreme Court may review by certiorari any decision of a district court of appeal that is in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same question of law.

Subsequent to the April 1, 1980 amendment, that section reads the Supreme Court of Florida may review any decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal or of the Supreme Court on the same question of law.

Viewing the constitutional amendment in light of the historical development of decisional

law, the court's analysis begins with the seminal amendment to the judicial article of the Florida Constitution which occurred in 1956 creating the district courts of appeal. The Jenkins decision quotes from the earlier decision of the Supreme Court of Florida in Ansin v. Thurston, 101 So.2d 808 (Fla. 1958), in which the court speaking shortly after the constitutional creation of the district courts of appeal points out that under the constitutional plan the powers of the Supreme Court to review decisions of district courts of appeal are limited and strictly prescribed. It was never intended that such courts be intermediate appellate courts. The new role of the Supreme Court of Florida after the 1956 amendment was as a supervisory body in the state judicial system, exercising power to preserve uniformity of principle and practice in the state.

Thereafter, the Jenkins decision reviews the decisional law in effect prior to the April 1, 1980 amendment to the jurisdictional provision, including a determination by the Supreme Court of Florida that under the former constitu-

tional provision conflict certiorari jurisdiction could be founded on a dissenting opinion to a per curiam majority decision rendered without opinion. See, Huguley v. Hall, 157 So.2d 417 (Fla. 1963).

Ten years after Huguley, the Supreme Court of Florida decided Commerce National Bank in Lakeworth v. Safeco Insurance Co., 284 So.2d 205 (Fla. 1973). While tentatively accepting jurisdiction (and subsequently discharging the writ for lack of conflict), the court observes that facts and testimony set forth in a dissent do not rise to a similar level of dignity as those set forth in a majority opinion and are not considered precedent.[2] The Jenkins decision goes on to list other decisions of the Florida Supreme Court which questioned the wisdom of the jurisdictional policy expressed in Huguley:

> "It was against this jurisprudential backdrop and in the face of a staggering case load that in November, 1979, this Court

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[2]The instant dissent of the District Court of Appeal contains no facts and is merely the dissenter's "opinion" that the "reasoning" of a sister court should be followed.

> urged the legislature, meeting in special session, to enact a proposed amendment to section 3 of article V of the Florida Constitution to limit the jurisdiction of the Supreme Court." Jenkins v. State, supra, at pages 1358-1359.

The legislature responded to the request of the court by enacting a joint resolution which forms the language of the current jurisdictional provision in the Florida Constitution. At hearings before the legislature and in meetings held throughout the state, members of the Supreme Court represented that one intent of the revision of the jurisdictional article was to eliminate the jurisdiction of the Supreme Court to review for conflict purposes per curiam decisions of district courts of appeal with concurring or dissenting opinion:

> "There can be little doubt that the electorate was informed as to this matter, because opponents of the amendment broadcast from one end of this state to the other that access to the Supreme Court was being 'cut off,' and that the district courts of appeal would be the only final courts of appeal in this state. With regard to review by conflict certiorari of per curiam decisions rendered without

opinion, they were absolutely correct." Jenkins v. State, supra, at page 1359.

The Supreme Court of Florida then went on to enunciate its precise holding:

> "The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term 'express' include: 'to represent in words'; 'to give expression to.' 'Expressly' is defined: 'in an express manner.' Webster's Third New International Dictionary, (1961 ed. unabr.). The single word 'affirmed' comports with none of these definitions. Furthermore, the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the decision of the district court of appeal. As stated by Justice Atkins in Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970), '[i]t is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari.' (Emphasis in original.)" Jenkins v. State, supra, at page 1359.

Accordingly, it was determined that from

and after April 1, 1980, the Supreme Court of Florida lacked jurisdiction to review per curiam decisions of a district court of appeal rendered without opinion, regardless of whether they were accompanied by a dissenting or concurring opinion when the basis for review was an alleged conflict of that decision with the decision of another district court of appeal or of the Supreme Court.

The petition for review filed by petitioner herein in the Supreme Court of Florida was accompanied by the district court of appeal decision. The Clerk of the Supreme Court, in accordance with its internal operating procedures, dismissed the petition for review, citing the Jenkins decision.[3]

The question presented here is whether this Court shall exercise its discretion to grant

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[3]Petitioner also complains here about the summary nature of the dismissal by the clerk without review by the court. Once the court had announced its policy that it had no discretionary jurisdiction to accept such decisions, it would have been a waste of judicial time and effort to require the members of the court to review petitions and supporting briefs before authorizing dismissal.

review of the determination by the Supreme Court of Florida refusing to grant discretionary review because of a lack of jurisdiction under the applicable constitutional provision. Many of the same considerations governing whether this Court will grant discretionary review were involved when the Supreme Court of Florida determined that it would not exercise its discretionary power of review.

Under Rule 17, United States Supreme Court Rules, review by writ of certiorari is not a matter of right, but of judicial discretion, being granted only where there are special and important reasons therefor. The dismissal of the petition for discretionary review by the Supreme Court of Florida satisfies no criteria entitling petitioner to further review by this Court.

Respondent certainly does not dispute the general principle stated by petitioner that the guarantees of due process and equal protection contained in the federal constitution intend that all persons should have access to the courts of this country. Petitioner, however, incorrectly relates what occurred in the Supreme Court of

Florida to an impermissible denial of the right to appeal and thus an impermissible denial of access to the courts of the State of Florida.

Petitioner fails to point out that the Constitution of the State of Florida provides an appeal as a matter of right to all litigants. Petitioner exercised this constitutional right by appealing to the District Court of Appeal of Florida, Fourth District. What petitioner is actually complaining about is the failure of the District Court of Appeal to write an opinion which expressly and directly conflicted with the decision of another district court of appeal so that discretionary review might be sought and might be granted by the Supreme Court of Florida. No authority is cited for the proposition, and research discloses none, which finds a denial of due process or equal protection for the absence of a written opinion explaining the decision of a court.[4]

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[4]If petitioner is actually aggrieved by the failure of the District Court of Appeal to write an opinion, the writ of certiorari presently addressed to the state supreme court should properly have been addressed to the District Court

In a landmark case, the Supreme Court of Florida requested a District Court of Appeal to write an opinion to accompany its decision. The District Court of Appeal correctly responded that its constitutional duty was to render decisions, not to produce theories and reasons for the decisions. Foley v. Weaver Drugs, Inc., 172 So.2d 907 (Fla. 3d DCA 1965). Even had the District Court of Appeal in the instant case written an opinion to accompany its decision affirming the trial court, acceptance of jurisdiction by the Supreme Court was still discretionary.

It is interesting to note that Florida's Ansin decision discussing the function of the state supreme court under the constitutional provisions creating the district courts of appeal quotes from the decision of this Court in Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 48 S.Ct. 422, 67 L.Ed. 712 (1923). This Court

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4 (Cont'd.) of Appeal, even though the state judicial system provided discretionary review by the supreme court. See, American Railway Express Co. v. Levee, 263 U.S. 19, 44 S.Ct. 11, 68 L.Ed. 140 (1923).

emphasized the obvious importance of developing consistent rules for limiting issuance of writs of certiorari to cases involving settlement of principles of importance to the public as distinguished from that of the parties and only in those cases where there is a real and embarrassing conflict of opinion and authority. The "decision" of the Supreme Court of Florida in the instant case does not settle an important principle nor does it involve a real or embarrassing conflict of opinion and authority.

Quite the contrary, it embodies the consistent position of this Court that the discretionary jurisdiction of a court can be utilized to keep its business to manageable proportions. See, Brown v. Allen, 344 U.S. 443, 73 S.Ct. 437, 97 L.Ed. 469 (1953).

The Supreme Court of Florida determined that a per curiam decision rendered without opinion creates no real or embarrassing conflict of opinions within the state court system. Accordingly, it has refused to exercise its discretionary jurisdiction to review petitioner's case. Not only is there no special nor impor-

tant reason for this Court to review such a determination (which accords with this Court's own views of its discretionary jurisdiction), but it is equally clear that in the denial of review by the Supreme Court of Florida there has been no decision on a federal question nor deprivation of a constitutionally guaranteed right.

Denial of review by this Court in the instant case would, furthermore, be in accord with long-standing policy not to review determinations of state courts of last resort refusing to accept jurisdiction without resolving the merits of the case before it. See, Norfolk & Suburban Turnpike Co. v. Commonwealth of Virginia, 225 U.S. 264, 32 S.Ct. 828, 56 L.Ed. 1082 (1912).

I. CONCLUSION

For the reasons and under the authorities set forth above, it is respectfully submitted that petitioner has shown no special nor important reason why this Court should exercise its discretion and grant review by writ of certiorari in the instant case. Just as review on writ of certiorari is not a matter of right under federal law, it is not under the Florida Constitution.

The Supreme Court of Florida determined that it did not have constitutional jurisdiction to review an affirmance by a district court of appeal without written opinion consequent upon an appeal as a matter of right taken by petitioner. As such, it determined that in the abscence of decisional conflict it was without power to review petitioner's case even if a majority of the court desired to do so. All litigants similarly situated are treated equally.

Petitioner had her constitutionally guaranteed day in the appellate courts of the State of Florida. No federally guaranteed constitutional right was denied by failure of the Supreme

Court of Florida to exercise its discretionary review. The petitioner for writ of certiorari previously filed in this Court should be dismissed.

Respectfully submitted,

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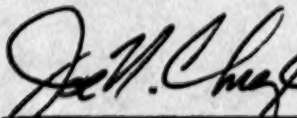
BY: 
JOE N. UNGER
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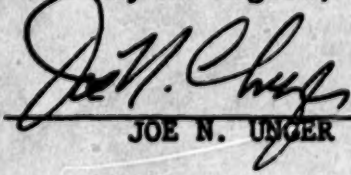
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent has been served upon Gary L. Wilkins, Esquire, Wotitzky, Wotitzky, Mandell, Batsel & Wilkins, 590 Harbor Boulevard, Suite 204, Port Charlotte, Florida 33952, by depositing in a United States post office or mailbox, with first-class postage prepaid, this 5th day of August, 1981.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